UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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RIO TINTO PLC,

Plaintiff,

v. 14 Civ. 3042 (RMB)

VALE, S.A., et al.,

Conference

Defendants.

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New York, N.Y.
December 9, 2014
9:55 a.m.

Before:

HON. ANDREW J. PECK

Magistrate Judge

APPEARANCES

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KAREN E. ABRAVANEL

(Case called)

THE COURT: The first thing we need to deal with is the letter system. We required your suggestion previously that letters come in a week before the conference to give the other side a chance to deal with it and not feel sandbagged. The result is roughly, I don't know, what would you say this is, two, three inches worth of papers with everybody writing and responding and replying. It just doesn't work.

We are either going to do a we will keep the week but it is a week for response and that's it or whatever you all suggest. But you have to do an agenda better than dumping all of this paper on me. Does anyone have suggestions?

MR. LYTTLE: Your Honor, a week response would be fine. If we can talk with Mr. Liman and defendants, we can set a deadline for responses three, four days before the hearing.

THE COURT: The only other problem I see with the week is at least one of the letters that came in, the first letter was we are still working on some of this, which means I wind up reading things that, if you are all doing your job right, are then moot by the time you get here. I would be more inclined to have the papers come in closer. Mr. Liman, what is your thought?

MR. LIMAN: Your Honor, I think that is our thought. Having conferences every four or five weeks, the parties usually start pretty soon after the conference meeting and

conferring. But it takes time to go back to our clients. Our suggestion would be several days before a conference and then the opposition. Then we would think a time for a short reply after that.

THE COURT: Particularly because you are all submitting different letters as to different parties, etc., I recognize it is a big case and there are a lot of parties and all the defendants do not have the same issues. But this is not briefing on a motion. There is supposed to be enough for me to understand what the issues are that you are going to be addressing with the Court.

Let's do three business days before and opposition -- let's go four and two, four business days before and then two business days.

MR. LYTTLE: Your Honor, if we are filing three, four days before the conference, the parties are pretty clear what the issues are. Actually, at our meet-and-confers, everybody states their position pretty well. I don't know that we need additional briefing in opposition. I think your initial submission three, four days prior to the conference could adequately address both your position and your response to plaintiff and other parties.

THE COURT: What I might do to you all is say we will do it three or four days before but we are going to do it then as a joint letter and none of this I don't want to be in the

joint letter or it's too hard to coordinate or whatever. Be careful what you wish for. It may be more on the defense side.

But it means there will be a paragraph, as there is in at least the first Quinn Emanuel letter, document number 118 here: Here is plaintiff's position, here is defendants', and we are done. That works a lot better for me. So that is going to be what we are doing. Three days before. It is plaintiff's responsibility to coordinate it all, but it is defendants' responsibility to cooperate on that and not say no, I don't want a joint letter.

MR. LYTTLE: Your Honor, if I could make one quick suggestion? I'm in favor of the joint letter process. Unfortunately, the defendants don't want to exchange substantive positions beforehand. We are kind of ships passing in the night a little bit.

THE COURT: It is going to be the same thing if I took your suggestion, which is everybody putting their positions in on the same day without knowing what the others' position is. Look, I'm not spending more time on this. Exchange your position a day before the letter is due, and the letter comes in three days before the conference, period.

MR. LYTTLE: Thank you, your Honor.

THE COURT: Now let's go on to substance. I'm more or less going to take it in the order the letters came in and we'll see how that works.

Scope of discovery. I'm working off of the jurisdictional issue. My question on this is how many times do I have to rule on the same issue? I said last time it was limited to Mr. Cilins in terms of being an agent of BSGR. I'm not advancing it to all these others, particularly where, at least as of now, you seem to be confusing merits discovery with jurisdictional. Any further discussion needed on that?

MR. LYTTLE: Your Honor, my colleague Keith Forst will address that. He has been the one directly negotiating with Mr. Steinmetz.

THE COURT: I think you are the one with the pro hac motion that I approved this morning. You will be getting it back on the ECF system today.

MR. FORST: Excellent. I appreciate that, your Honor.

At the last hearing, on November 3rd, your Honor, we specifically identified defendant Cilins as somebody that we need to pursue discovery on. As to the other agents, I want to be clear, because there is a little mix-up I think in the letters. We are not asking them to collect documents with respect to any other individuals.

Our sole request, which is tied to our allegations in the complaint with respect to Michael Noy, Pentner Holdings, was simply that on information and belief based on some publicly available materials as well as what is in our complaint, these other people were actively involved in Mr.

Cilins's activities here in the United States, and specifically coming to Florida and having phonecalls in New York.

All we ask with respect to those agents, your Honor, is simply that they run search terms against their custodians, just to hit some documents with those names. Again, based on their contention that they aren't agents, they weren't involved, we expect very little documents to come back, if any. Yet to date, with respect to those agents, they have flatly refused to even run those terms. That is all we are asking with respect to those agents.

THE COURT: If you find a document that refers to a Michael Noy, what does that prove?

MR. FORST: What we think it will prove, based on the allegations, and it is set forth in our complaint, is that when Cilins was here in Florida, again on information and belief in our allegations, interacting with Mamadie Toure to destroy evidence, there was in fact a phonecall that took place between Michael Noy, Avraham Lev Ran, and Mamadie Toure regarding activities to cover up the scheme and the bribery that went down in the United States.

We are not trying to get at the larger interaction, what Michael Noy did in Guinea per se or anything else or what happened in New York, but simply focusing on the things that took place in the United States which are relevant to the jurisdictional inquiry under 4(k)(2), under the long-arm

statute, etc. That's what we are trying to target.

We understand that this is iterative. We are not saying you have to review all the documents. If they run a term, your Honor, and it comes back with 100,000, we are happy to revisit it. We are simply asking can you run the term and see what the hits are.

THE COURT: The request is still denied.

Time period for jurisdictional discovery.

MR. FORST: Right.

THE COURT: Are you really arguing that there is a general jurisdiction argument, or is it New York long-arm specific jurisdiction?

MR. FORST: Right now, you're right, in our complaint we don't plead general jurisdiction applies, we plead specific jurisdiction. Also, 4(k)(2) talks about when you don't have general jurisdiction in any particular state, you can look at the broader United States. These labels of general jurisdiction versus specific, again, all we have asked is when we are looking at the United States, New York, Manhattan, to run those terms over --

THE COURT: That's the question. What is the time period?

MR. FORST: What we have proposed is not defendants come in and ask for a single day, we will run it on the day of the complaint. We have said I don't know how that works

because documents can be created and emails can be sent. We have looked at the case law, and we sought to suggest can you pool a dataset of just six months leading up to the complaint, we will take a look at the hits, if there are too many, again we will revisit it.

We went back and forth. They have come back now with a two-week window. We think simply that that two-week window overlooks potentially real estate documents, emails, communications that could be coming up a little bit before that that relate to the time period of the complaint.

We are kind of having this discussion in a vacuum, your Honor. I think defendants haven't collected those documents yet and run any search terms, so we don't know really what the universe of documents are. We are at that stage where we have simply requested if you pool those custodians, and again there is an issue on that, and run those search terms -- "United States," "Manhattan," "New York" -- or particular terms that defendants' counsel suggested last time we were here on November 3rd -- again, we are open. We want this to be iterative. We are suggesting search terms. But without hits, we just don't know.

THE COURT: I understand that. But without a theory of what the general jurisdiction is, you are going blindly. Frankly, it does not sound like there is really a general jurisdiction argument being advanced as opposed to what we

usually call a fishing expedition.

MR. FORST: There is one, your Honor, in the complaint, where it is specific to defendant Steinmetz. We identified two properties that he has, one in New York at the time of the complaint and a second one that we think he owned or maintained or operated earlier specifically during the conduct alleged in the complaint.

THE COURT: But for general jurisdiction, it matters at the time of the complaint, not at the time of the prior conduct.

MR. FORST: I credit that. All we are saying is we need a window of time to gather documents that will reflect the conduct around that.

THE COURT: We are talking at cross-purposes. If you say the only thing you really know as to general jurisdiction is that Mr. Steinmetz owns one property now and owned another one previously, I might give you discovery as to whether indeed he owned something in New York around the time of the complaint. That would seem to be it for general jurisdiction. Why don't we stick with that.

As to Steinmetz, who is responding?

MR. FILARDO: Your Honor, we have no problem searching around the time of the complaint for any property that is alleged to have been or is owned by Steinmetz.

THE COURT: Frankly, do you need a search?

MR. FILARDO: Your Honor, we don't really need search terms. We need to search for those documents. To our knowledge, he doesn't own it. He may have owned something or owns an entity that may have owned it ten years ago. I really don't know. We are happy to test it.

THE COURT: How about an affidavit from Mr. Steinmetz that within six months around the filing of the complaint in both directions he did not own any property in New York?

MR. FILARDO: Or an affidavit from a trust or something that may have owned that he was the beneficiary of, someone with personal knowledge.

THE COURT: Someone with personal knowledge. That way we don't have to search.

MR. FILARDO: We had also suggested to plaintiff that they actually go to the building were they claim the apartment was. We did. They were prepared to give an affidavit or testimony, but only on subpoena. They wouldn't just hand it over to us. They alleged the Sherry-Netherlands was the place that Mr. Steinmetz owned the apartment. We went, we spoke.

THE COURT: Rather than involving co-op boards or whatever, just an affidavit from Mr. Steinmetz or somebody with knowledge on his behalf that he doesn't own the apartment.

MR. FILARDO: We can do that, your Honor.

THE COURT: That takes care of that.

As to the specific jurisdiction, let's deal with those

time frames.

MR. FORST: Your Honor, just one point of clarification. Is it an affidavit that he doesn't own any apartments in and around the six-month period?

THE COURT: Yes, any real estate, any property of any sort in New York. It is just in New York, not all U.S., right?

MR. FILARDO: That's correct, your Honor.

MR. FORST: Our allegation in our complaint is New York.

THE COURT: Then that's what we are dealing with.

Specific jurisdiction. There seems to be disputes as to the time period.

MR. FORST: Thanks, your Honor. Again, these are allegations that connect to Mr. Cilins that we previously spoke about. We have laid out, I don't want to revisit them, the allegations in March and April 2012, a similar time period in 2013, where again we believe he traveled to the United States. In fact, we have an investigation going on in the SDNY in which he has been indicted and jailed for those activities.

THE COURT: What specifically are you looking for?

MR. FORST: We are looking for documents reflecting that. The defendants have contested he is not our agent, he wasn't here at the behest of defendant Steinmetz or BSGR in the United States doing these things. We think there are public documents that suggest otherwise.

We have simply asked that they run terms over the period of 2012 and 2013 to identify email communications, other documents reflecting those activities that took place in the United States. We are focused on that because we recognize it is only jurisdictional discovery.

The defendants have come back and said that window is too broad. They point to 10,000 documents coming back or really 9,000, 9,228, that hit on Fred Cilins over that two-year window of time. We respectfully submit that that is not an unreasonable number of documents to look at for such a central player in the scheme of the bribery.

THE COURT: Do you want to pay for half of it?

MR. FORST: I guess we haven't heard what the amount would be, but I think we would entertain that, assuming it's a reasonable amount.

MR. FILARDO: Your Honor, we are arguing that the scope of this inquiry should be for the period that is alleged in the complaint. It is a period of April 27, 2012, to May 8, 2012, and March 1, 2013, to April 14, 2013.

THE COURT: In order to make sure nothing is being missed, I would give some appropriate period of time before and after each of those periods to catch the email sent a month after he was back saying pay my airfare or whatever.

MR. FILARDO: Perhaps a month, your Honor, before and after. But plaintiff is seeking a two-year period, a full two-

year period, without any basis for it. There are no allegations in the complaint that go that far.

THE COURT: There are 9,000 and change documents hit by it, is that correct?

MR. FORST: That's correct, over the two-year period of time.

MR. FILARDO: Let me take a look.

THE COURT: Have you looked at any of them to see how you would winnow them down?

MR. FILARDO: No, your Honor. All the hit reports come from our IT consultants. They run the searches on the date ranges and the custodians.

THE COURT: It is a deduped number?

MR. FILARDO: Yes.

THE COURT: If one search term hits the document and then another search term hits the document, is that counted twice or once?

MR. FILARDO: What we did, I believe we ran "Cilins." So that's broad. Even if you tried to break it down broader still, that is the broadest amount of hits we brought back.

MR. FORST: The defendants have told us they can't run unique hit reports. In fact, we suspect that number to be perhaps larger than it would turn out to be for your documents to review.

THE COURT: If the hit report is on "Cilins."

MR. FORST: "Fred" and/or "Cilins." It is running those two terms.

THE COURT: You are really running "Fred"?

MR. FILARDO: That's what they want, your Honor.

MR. FORST: It's his name, yes.

THE COURT: I know it is his name. How many Freds are there in this case? All right, I will give you March 1 to July 1, 2012, and for the 2013 period February 1 through June 1.

MR. FORST: Thank you, your Honor.

THE COURT: That takes care of that.

Custodians, have you worked that out?

MR. FORST: Your Honor, I think we are closer to that. Some of these letters have provided clarity on that. Respect to specific jurisdiction, we went back and forth. We proposed a set. They came back and let us know that there were certain operators only in Guinea. Some people were never employees. Of course, if they don't have PSD files pulled for certain custodians, we can't insist. So we are OK there.

General jurisdiction. There are a few high-level executives that we have asked to take a look at, and they are identified.

THE COURT: The general jurisdiction we just limited to the real estate.

MR. FORST: That's right.

THE COURT: So that's moot.

MR. FORST: Forgive me. Then as to custodians, I think we are agreed.

MR. FILARDO: Your Honor, if I could for the record to make it clear, I think on specific jurisdiction we have 12 custodians, I will read them into the record, that we have agreed upon: Asher Avidan, Benjamin Steinmetz, Dag Cramer, David Clark, David Trafford, Francis "Frank" Eagar, Gerard "Gerry" Wilson, Iwan Williams, Mark Struik, Peter Driver, Sandra Merloni-Horemans, and Yossie Tchelet.

THE COURT: The next section is search terms and metrics. What is the dispute on that, if any?

MR. FORST: I think the dispute on that is simply again we are still working through some of the other search terms that we have initially proposed. For example, we have a set of terms talking about, tied to allegations in our complaint, attestation and declaration, where we have proposed that these terms be run in front of a window. Again, this boils down to conduct that Cilins participated in here in the United States that documents were signed and otherwise destroyed.

THE COURT: What is it you want me to rule on? What is the dispute?

MR. FORST: I think we identified our period of time, 3,000-plus documents to review on those terms. We would submit that is a reasonable number that tie directly to the

allegations in our complaint that they can review. Again, they are attempting to limit the windows directly to the weeks that are specific in our allegations. We are asking simply for a little bit broader than that.

THE COURT: I have already ruled on the time period.

MR. FORST: That's correct. But that was specific to the terms "Fred" and "Cilins," as I understood it.

THE COURT: It is for everything. That is your specific allegation period with enough buffer zone before and after, right?

MR. FORST: Specific to that term. For example, we have allegations in our complaint that tie to payments made in 2010 and cash payments in Wells Fargo. We have terms that we have asked they run for 2010 and 2013. The windows vary depending on the particular term that we are asking for.

THE COURT: Tell me exactly what you want now.

MR. FORST: In our letter, your Honor, we are looking at page 4, we are asking for what we talked about, the first full paragraph, which starts "Accordingly." We have search terms. The first part we have dealt with Cilins' conduct. The second part, we have term names of wire transfers tied to the amended complaint. We are asking for the years 2010.

THE COURT: When were the wire transfers?

MR. FORST: In 2010. Are you asking specifically?

THE COURT: The entire year or were there months?

MR. FORST: They were specific weeks within that year, as far as we know. Again, some of this is on information and belief of what we know.

THE COURT: There is a limit to what I can give you here, particularly when we are talking jurisdiction, not the merits. If you get jurisdiction over these folks, a lot of this may have to be redone. Obviously, the Steinmetz-BSGR folks should consider that. You cut it narrowly here, which you have every right to do. I'm not going to look favorably upon an argument later that says we did this already and now they want it for more. That's going to be tough.

MR. FORST: Understood, your Honor. At page 41 of our amended complaint, paragraph 40 in particular, we lay out the various cash payments and wire transfers.

THE COURT: You have to hand things up. The file is now too big that I am not searching in the file for anything previous.

MR. FORST: The bottom line, I would submit, taking your guidance on Cilins, we have months in here, July-August 2010, that we can go back and work out with defendants on a window that is narrower in 2010 but covers and gives us some cushion on the back end.

THE COURT: And 2013?

MR. FORST: Same.

THE COURT: What are the months there?

MR. FORST: July is the month. I need to confirm that. Your Honor, I don't have my finger on it right here. In my mind is sticking out April or July 2013. In any event, taking your guidance, which I fully understand --

THE COURT: It would appear to be March 1 through April 14, 2013, at least based on the defendant's paragraph.

MR. FORST: On Cilins?

THE COURT: Is that the wire transfers?

MR. FORST: Yes.

THE COURT: OK.

MR. FILARDO: Your Honor, the allegations of the wire transfers have to be with Cilins's conduct, not my client's conduct.

THE COURT: Then presumably you don't have any documents.

MR. FILARDO: Your Honor, yes, this goes to the merits. Whenever we are speaking about the conduct of an alleged agent or co-conspirator, it is going to the merits. It is not the relationship between my clients, defendants BSGR and Mr. Steinmetz, and Mr. Cilins to try to determine what, if any, relationship exists between them.

THE COURT: That was their proposal.

MR. FILARDO: Yes. That's why we proposed just "Fred" -- they proposed "Fred," we proposed Cilins. We will run "Fred" and "Cilins" over the period that your Honor has

already ruled upon. We think that should be broad enough to capture anything that they have alleged with respect to jurisdiction, specific jurisdiction, as a result of an alleged agency relationship.

THE COURT: It doesn't seem to overlap, at least in 2013. As to 2010, run Mr. Cilins' name for July and August 2010. Add that to your "Cilins" search, and that should cover it.

MR. FORST: Your Honor, while we are there, I want to be contrary. We have asked for their particular bank accounts, Wells Fargo and other things, that tie to these wire transfers and cash payments over those periods. We would ask that those terms be included for those limited windows. Again, we are willing to narrow it down.

THE COURT: Either Cilins did it, in which case you may pick it up through that -- specifically, what words are you asking to be searched for July and August 2010?

MR. FORST: What we are asking for for July and August 2010 is "Wells Fargo." Just one term we are asking for to that specific allegation in our complaint.

THE COURT: All right, run "Wells Fargo." But if it is not related to what Mr. Cilins was doing and it is something else about Wells Fargo, they do not have to produce it.

MR. FORST: The only other two terms, your Honor, are "attestation" and "declaration."

THE COURT: No, that's too broad. Enough. What else? Are we up to page 6, 7, what? This is the first letter. We have a lot of work to do, and I have other cases.

MR. FORST: I understand.

THE COURT: You all are getting at risk that if you can't work together better, you may go the special master route and be paying by the hour for it.

MR. FILARDO: Your Honor, I think we are done. I think you covered it all by just getting to the heart of it.

THE COURT: That's what I need to make sure of.

MR. FORST: Your Honor, with respect to Steinmetz and BSGR, I think that covers it.

THE COURT: Is this letter now done?

MR. FORST: Which letter, I'm sorry?

THE COURT: Your letter of November 17th.

MR. FORST: Yes, that letter is done.

THE COURT: Good. Next. On the Rio Tinto investigation issue and the privilege waiver, do we have a privilege log at this point or no?

MR. LIMAN: No, your Honor, we have not.

MR. LYTTLE: We do not.

THE COURT: We are going to take this in baby steps. Produce the nonprivileged documents on this issue. Produce the factual information from any privileged document that is relevant to the investigation and diligence issue, and log

everything else. At that point I will determine further whether there indeed has been a waiver or not. It may not even be necessary to go there.

MR. LYTTLE: Your Honor, thank you for that. There are two time frames at issue here. If I could briefly address that, because I think that would help us know what is relevant.

THE COURT: You are raising a question, which is how much privileged material is there, allegedly privileged, outside of the time period. If the answer is not very much, since in theory there could be a memo the day before the lawsuit, that's all lovely.

I can see lines, I can see two colors. I can't see a single word on there.

MR. LYTTLE: May I approach, your Honor? And I have a copy for counsel.

THE COURT: Yes. What works for a jury only works with a judge if it is large enough type for those of us whose eyes aren't what they used to be.

MR. LYTTLE: I was impressed we had a poster board, your Honor, and I wasn't trying to set up a PowerPoint. May I approach?

THE COURT: Yes. If you want to give me the poster board so you don't feel like it was a waste, that's fine. But holding it down there doesn't help me.

MR. LYTTLE: Your Honor, as I indicated, we are

seeking a little guidance on the privilege issue and what time periods are relevant. The time period that you look for is you look back four years from when the plaintiffs filed, which takes us back to April 2010. What they challenged is our due diligence for equitable tolling and fraudulent concealment.

Your Honor, the only period for which equitable tolling and fraudulent concealment is relevant, if they are correct that they run from December 2008, and we dispute that, but let's assume arguendo for now that they are correct, the only period for which our due diligence, our investigation, is relevant, i.e., the only period for which we should be looking for privileged documents, is December 2008 to April 2010.

Anything within April 2010, the reports, any investigative reports done by counsel, those are work product. Any legal advice deriving from those are work product. Under Hickman and Upjohn, even the facts in those, your Honor, they have to show substantial hardship and undue burden.

Your Honor, they are free to do their own investigation. This is not a David-and-Goliath situation. We know they have their own investigators. We are happy to log the privileged communications between December '08 and April 2010, but up to April 2010, up to the filing, they are not relevant.

THE COURT: The general rule, putting aside any and all arguments, is that privileged documents up to the date of

the lawsuit are logged, then people fight about their relevance or not. If you are telling me, in this world of emails and all of that, that that itself is an extraordinary burden, I might consider --

They are arguing there is no relevance to it, you are arguing it is not. I can deal with the issue and the waiver and all of that, or we can take this and say if there are only five documents to log, let's log them and we will worry about it then. They might decide they don't want them or whatever. What is the volume we are talking about?

MR. LYTTLE: I think it depends, your Honor, on what custodians we are able to agree on. We have identified to them the two fact witnesses, who are not lawyers, who oversaw the investigation. We have agreed to pull their files.

THE COURT: Hold on. Was it your firm or someone else who has been advising them as outside counsel?

MR. LYTTLE: Our firm became involved in the fall of 2010, your Honor. It was actually our prior firm, but the same lawyers.

THE COURT: How much email communication? Whether we search it out of your files or your clients', I don't really care. Not your internal documents. How much went to the client?

MR. LYTTLE: Quite a bit, your Honor. There's a lot of factual scenarios in this time period.

THE COURT: 10,000 emails? What are we talking about when you say a lot?

MR. LYTTLE: I don't want to represent to the Court. I don't have an exact number.

THE COURT: As of now you are going to log them all.

MR. LYTTLE: Your Honor, one more thing. On a custodian basis, they are going to after this hearing ask for our general counsel. That is a huge burden, to pull our entire general counsel's files to identify a few documents that may be relevant to this investigation.

THE COURT: Then come up with search terms.

MR. LYTTLE: OK. There were other lawyers involved that we are happy to pull their files and run the terms through those. We just ask, your Honor, that we don't have to pull our general counsel's files and run search terms through even those, because the burden could be extraordinary.

THE COURT: Lawyers telling me the burden could be extraordinary means they haven't done enough investigation to figure out either how to do it or what the volume and cost is not to. A minute ago your colleague said 10,000 emails here and 5,000 emails there is not a burden. I cannot imagine that that is going to be the quantity even over a four-year period or a six-year period in general counsel.

The answer is you're going to work it out with the defendants. I hope I do not have to hear this logging issue

again. Are you saying the general counsel essentially wasn't involved and that somebody else in counsel's os was involved?

MR. LYTTLE: The general counsel had some role, but there were other lawyers that played a more day-to-day role.

THE COURT: Would they have likely everything the GC has?

MR. LYTTLE: Yes, absolutely.

THE COURT: Then without waiver, are defendants willing to accept the search from the other lawyers and go back to the general counsel if it starts appearing he's gotten emails?

MR. LIMAN: Your Honor, we are operating in a complete vacuum. What we just heard about the role of their firm, that is the first time we heard it. What we would be prepared to do is meet and confer with them with respect to burden with respect to different witnesses. We think search terms should be run through the general counsel. That doesn't interfere with the general counsel's operations.

THE COURT: It depends on what the search term is.

MR. LIMAN: That's right.

THE COURT: If the general counsel had a lot of issues unrelated to this case, using a search term -- read all of you the Facciola and Redgrave law review article in the Federal Courts Law Review on bucketing privileged material and meet and confer. As of now the Court's ruling is there isn't a waiver

of the privilege. I'm not saying there isn't or is, I just am not ruling. Let me be clear on that. But you are going to produce the factual information certainly between 2008 and 2010, you will do whatever you think appropriate after 2010, and you will log all the allegedly privileged documents.

MR. LIMAN: Your Honor, with respect to the factual information after 2010, I didn't hear any objection with respect to relevance with respect to that.

THE COURT: Factual and not in lawyer's material. They are saying it's work product if it was in the lawyer's files.

MR. LIMAN: Your Honor, if I could hand up the complaint.

THE COURT: No. I've read enough letters on this. As of now, since we are still slogging very slowly through it, the factual information other than what you are calling privileged throughout the entire time period, with primary emphasis in terms of priority on 2008 to April of 2010, but I'm not cutting it off there. You will come up with a protocol for search terms and how to log the privileged material as a result of that, and then you will see if you can further resolve this. If not, it will be back on my doorstep.

MR. LYTTLE: Your Honor, one last point. After April 2010 what we have here is a relevance argument. The Erie case makes clear that it is not relevant.

THE COURT: Counsel, this issue is done.

I think the last thing in the 11/17 letter from Mr. Liman, docket number 119, are plaintiffs' interrogatory responses. The names of the people with knowledge, to wit, the investigative information people, has that been resolved or not?

MR. LYTTLE: Your Honor, we have identified the percipient facts. The investigating firms and the internal employees oversaw the investigation. We have not identified any law firms and we have not identified --

THE COURT: Now you can identify the law firms.

MR. LYTTLE: All right.

THE COURT: Who else didn't you identify?

MR. LYTTLE: We did not identify the internal lawyer.

THE COURT: You will identify external and internal lawyers by the end of this week.

MR. LYTTLE: Yes, your Honor.

MR. LIMAN: Your Honor, would that include the investigative firms working with the outside lawyers? I think that is called for.

THE COURT: Meaning if they hired Kroll or somebody like that?

MR. LIMAN: Correct.

MR. LYTTLE: We are happy to. I think Mr. Liman has one investigative firm in his mind that was hired after the

complaint was filed. There is no way that that should be identified.

THE COURT: Precomplaint, if there was an investigative firm of any sort, whether working with the lawyers or not, I don't find that to be privileged. That takes care of that letter.

Docket 120 was the response on privilege, so that takes care of that.

121 somehow is the same letter as 120. Let's hear it for the ECF system.

122 is further briefing on this, as is 128.

123 is more on search terms and the like that I have already dealt with.

133 I believe we have taken care of.

The next letter seems to be docket number 131, Quinn Emanuel's letter of December 3. Yes, there can be a revisiting of search terms after the initial production. Everything is being done without prejudice.

The next issue you seem to have worked out, the dates for the privilege log with respect to the Guinean privilege. Those dates are acceptable.

Discovery with respect to Vale. In general, it should be going forward.

Now we go to custodians. Have you worked out your custodian issue?

MR. LYTTLE: Your Honor, if I may ask one question? Discovery should be going forward, we agree. They have taken the position nothing more until their review of this hypothetical production. We have reviewed it. It's about 840 documents. It is responsive to about 20 percent of our document requests.

THE COURT: I think I just said yes, there will be discovery. You are arguing with something I just ruled in your favor on, which is never a good thing.

MR. LYTTLE: Thank you.

THE COURT: Custodian list.

MR. LYTTLE: Your Honor, we have provided Vale with a proposed custodian list. They have come back with some comments. We have met and conferred. We have made counter-proposals. We are waiting to hear more.

THE COURT: So it is not ripe for resolution, you are all working it out?

MR. LYTTLE: With one exception, for the BHP request, I think we are still negotiating our broader custodian list.

THE COURT: You said with one exception. I'm sorry.

MR. LYTTLE: Yes, the BHP request. At the last hearing your Honor ordered production on the BHP takeover attempt from, quote, a very limited set of custodians for a limited time frame. We came back, talked to our client, and said who are the five core people that handled all aspects of

the BHP takeover, looked at what was being offered, looked at the different options. We proposed that to them. They have flat-out rejected that. In document 134 they say we proposed low-level custodians and this is not who they need discovery from.

Your Honor, we have said fine, we will give you five more. They came back with 16-plus custodians, more than triple what we had offered to provide, 16-plus custodians for the BHP requests alone. Instead of limiting the time frame, they actually expanded it beyond our actual document request.

Your Honor, we are happy to produce in response to the BHP request. We think five custodians on that issue is more than enough. If they don't like the five we have, we have offered them an alternative five, but it is one of those two. You don't get 16-plus custodians on what your Honor recognized was a tangential issue to this case.

THE COURT: Mr. Liman.

MR. LIMAN: Your Honor, if you are becoming confused, it is because this issue pertains to our discovery with respect to Rio Tinto, not Rio Tinto's discovery with respect to us.

THE COURT: Yes.

MR. LIMAN: With respect to Rio Tinto's discovery of us, I think we are working on the custodians and still meeting and conferring.

On the BHP custodians and the BHP document production,

basically nothing has happened from the plaintiffs since the last conference we had before your Honor. They proposed to us five custodians. We listed, and it is listed on page 20 of the letter, the 11 custodians who from our investigation are the custodians who could have relevant documents with respect to this request. We have listed their titles. We have listed the basis for our belief that those are the relevant custodians. Those are the custodians we would be satisfied with.

MR. LYTTLE: Your Honor, 16-plus custodians is not a very limited set.

MR. LIMAN: I listed 11.

THE COURT: If you have offered five that they don't want, then we are down to 11. What's wrong with their 11 or at least some of their 11?

MR. LYTTLE: Your Honor, for their entire production they have offered seven custodians. They want 11 on a limited issue. That is beyond the pale. They've got the five people that they want. We have agreed, we have offered them a different set of five. Our point is it is five on this issue, it is not 11, it is not 16.

THE COURT: We will start with 5. You can convince Mr. Liman that that he should take some of the ones on your list because they are likely to have the most documents; otherwise, I will let defendant choose. However, if you don't take any of theirs, Mr. Liman, on the assumption that they know

who was most involved, and you pick five as a starter from your list and then are shocked that they don't have the material, I may not give you any more. If you take the five that Rio Tinto has proposed and it turns out to be insufficient, then you are likely to get all 11 of yours or at least a large number.

So you are on both sides going to have to make some decisions. All discovery that is limited at this point is open for further expansion in the event that while following proportionality, rules it turns out that the information is insufficient.

Do you want some of their five and some of yours for a total of five, Mr. Liman? I'll let you and your team talk to plaintiff's counsel and figure out who you want.

MR. LIMAN: Your Honor, we have proposed search terms to get the BHP documents. We would ask that those search terms be run and that the production start. We didn't hear any response back to the search terms other than that we had discussed predictive coding weeks and weeks ago. Plaintiffs said they would get us a proposal. They never did until recently. There is no reason to delay with respect to these.

MR. LYTTLE: Your Honor, on the phonecall that we had, we discussed BHP custodians and search terms. Mr. Liman actually left the call. He hasn't participated in a call since. But if he was there, he would know that his colleague Mr. Karlan said let's not discuss these search terms today,

let's do it at another date, which we agreed to at their request.

We are happy to discuss search terms, but we think this is a great case for predictive coding. We have provided them a predictive coding proposal. But I think your Honor knows better than the I do, because I haven't done predictive coding yet.

THE COURT: Are you talking predictive coding just on the BHP Billiton?

MR. LYTTLE: No, your Honor. We need to poll the entire dataset, create our seed set from that, which would include custodians, would include marking the seed set, and run running the coding that way. You can do predictive coding, and I have talked to our experts, subject matter by subject matter, but it is not ideal. It is also not ideal to run search terms prior to predictive coding. I know there is some debate in the community about that.

THE COURT: No, there is really no debate.

MR. LYTTLE: What is your view, your Honor, if I could ask?

THE COURT: Search terms to find your seed set are great. Search terms to limit the universe that you are running your population against means that everything you didn't get with the search terms will never be found by the predictive coding engine, which usually skews the results.

There is usually a cost factor. I am hearing that vendors are changing their pricing models, but that in the big cases like BioMed, where predictive coding was run only after a key word search, it was because the vendor would have charged more than BioMed thought it could afford to put 19½ million electronic documents through the predictive coding engine as opposed to winnowing it down with search terms to 2½ million. So, it depends.

My question is this. We are probably by early next year going to actually put this case on a schedule and not keep slogging along slowly, once Judge Berman decides the exclusive/nonexclusive jurisdiction issue. I know he had oral argument on that, and I think an opinion should be forthcoming shortly. That will either get the case out of here or set you up for the next set of motions or whatever. But at some point we are going to be going much more quickly.

In the meantime, since you want all of this stuff from then, how long is it going to take you to get your predictive coding scenario with all document requests up, running, tested, QC'd, etc.?

MR. LYTTLE: Again, your Honor, I must be completely honest. I'm operating a little bit in the dark. I haven't done predictive coding. I don't think Mr. Liman has, either. We have talked about it. With my vendor, I think to get the full dataset pulled, to get seed sets pulled, to mark those, I

think, honestly, you're looking at at least a month, with the holidays.

THE COURT: You are probably talking way more than that.

MR. LYTTLE: I think so. Two months?

THE COURT: Let's do the BHP documents the old-fashioned way for now. Finish with Mr. Liman or one of his colleagues the search term discussion quickly, and let's get that done with an aim that you will be producing it before New Year's. Negotiate fast, folks, on that. Whether that gets revisited and expanded if we go to predictive coding for everything else, I'm certainly in favor of using predictive coding as a general matter.

MR. LIMAN: Your Honor, the last issue I think is the date range. The plaintiff proposed a date range of November 1, 2007, through November 25, 2008. We proposed a date range that would extend to June 30th of 2009. Up until June 30, 2009, there were discussions with respect to BHP Billiton. June of 2009 is the same month that Rio Tinto broke off negotiations with Vale, our issue in this case. Rio Tinto and BHP Billiton announced their plans for an iron ore joint venture in Australia. To our mind, that is the appropriate cutoff.

THE COURT: Which is an extra seven months.

MR. LYTTLE: Your Honor, at the last hearing you limited the time frame from November 2007 to November 2008.

That is exactly the time frame they asked for in the document request. They expanded that now after your Honor ordered a very limited time frame. That correlates exactly with when the BHP takeover attempt was first made and when it was off the table. The subsequent joint venture that they now want to extend to is a completely different deal. It was cooperative deal. It was not a takeover attempt. So, the idea that you can find things in takeover defenses simply doesn't apply to that.

THE COURT: Now we are going to limit it from November '07 to the end of November '08 period.

MR. LIMAN: Your Honor, I'm informed that that is not correct. What I would like to do is reserve the opportunity, after we get the documents up to November of '08, to come back to your Honor and make that showing.

THE COURT: All right. That doesn't mean you're going to have an easy task at that point.

MR. LIMAN: I have to trust.

THE COURT: What else?

MR. LYTTLE: Two points, if I may, on the production of BHP. There is the holidays. If we could have until the middle of January. Secondly, if we are going to tier some productions, which we are happy to do, and we have told defendants we are happy to do that, then defendants need to start producing the misappropriation documents which we

likewise provided them custodians and search terms for.

THE COURT: You are both fighting over that, I think. Any objection to extending the BHP production until January 9th?

MR. LIMAN: No, your Honor.

MR. LYTTLE: Your Honor, if we could also get a date for Mr. Steinmetz and BSGR, we would appreciate that.

THE COURT: Mr. Filardo?

MR. FILARDO: Your Honor, there are a number of custodians, one or two, in South Africa, and another one in Paris that we have to get on line. That is going to take us some time. We have actually been working on that issue over the past few weeks. Given the holidays, could we have until the end of January or mid January?

THE COURT: You all have to start moving faster.

MR. FILARDO: If we can, we will do it on a rolling basis.

THE COURT: January 16th. Get it done.

MR. FILARDO: Thank you, your Honor.

THE COURT: Everybody should be operating on a rolling basis to the extent possible.

You each seem to be fighting over the alleged misappropriation information issue. Vale wants more specifics. You at Rio Tinto want the information. I'm not quite sure how to deal with this.

MR. LYTTLE: Your Honor, if I may. After the last conference, we took your order very seriously. The data room had over 200-plus documents in it. We have successfully winnowed that down to nine documents. These are the nine documents that the Vale employees repeatedly, consistently accessed throughout the negotiations. These nine documents contain the key information that we have always alleged, which relates to the geological data, the rail and transport options, both through Guinea and through Liberia, and the port.

THE COURT: I'm looking at Mr. Liman's analysis or summary of the categories. I'm looking at page 9 --

MR. LYTTLE: Yes, your Honor.

THE COURT: -- and 10 of your joint letter, which seems like a very broad base of information.

MR. LYTTLE: It does and it doesn't, your Honor. They were able to identify with this level of specificity just by going through it. Your Honor, with search terms and custodians is how we are going to deal with this. That is exactly what we have provided them.

This is a RICO case. This is not a misappropriation case. It is not a trade secrets case. All of their case law talks about misappropriation and trade secrets cases. We have case law from the Southern District that says, and even their cases say, you get some discovery, you try to figure out exactly what it is, and then you winnow that you down. It is a

filter approach.

THE COURT: If we limit it to these nine documents, and I'm not saying that that alone is sufficient or isn't sufficient, where are you all on appropriate key words, custodians, whatever, so that this isn't going to be a million documents?

MR. LIMAN: Your Honor, we received a list of search terms from the plaintiffs. Those search terms are tantamount to asking us to search for documents regarding Liberian ports and regarding the geology of Simandou.

I would remind your Honor, and I sort of get the feeling of Groundhog Day with respect to this issue, of the dialogue when we last discussed this. When we last discussed this, the plaintiff made the argument that they are making now, which said, we focused in on geological data, rail and transport plans, and mining data, that's what we focused in on. Your Honor responded, isn't this a mining company, so isn't that like saying just give me anything about the business? It is Groundhog Day because that is where we were last time and it is where we still are.

The problem with respect to the nine documents is that the nine documents contain pieces of data and information that touch on everything with respect to Simandou. So this is not just a matter of anything relevant to the claims. This is a matter of the plaintiffs asking your Honor to permit them

discovery in search of a claim. It's the definition of a fishing expedition.

It actually also exactly reads on point to our Swift Communications case, which is precisely the issue in Swift Communications, same stage as this stage here. That was a misappropriation claim, Vale 9 in isolation. Here misappropriation is one element.

The court there, it is 2012 WL 2342929, said that you are not permitted to do discovery in search of a claim.

THE COURT: A shocking statement. All I mean is in the abstract that doesn't help.

MR. LIMAN: What we are asking for, your Honor, is we provided a list of the types of data that we were able to discern from these documents. What we would ask is that the plaintiff tell us which of these pieces of data their complaint is about. If it is not these particular pieces of data, then identify what other pieces of data it is.

From that, we can come up with a list of search terms that is something other than a Liberian port. It shouldn't be that difficult. It should be something that they can do in the next week. And it would be without prejudice.

MR. LYTTLE: Your Honor, it is important to set the context here. Vale may be a mining company, but Vale is not a mining company that ever had to deal with Simandou, so we gave them access to our data room. The confidentiality agreement

they signed precluded their use of any information they saw for any purpose whatsoever.

Our discovery is not targeted at getting at what exactly did you take. Our discovery is what did you do with our information, how did you use it to further the conspiracy, how did you use it in violation of the deed? It is not targeted at identifying you stole this exact thing. It is not a case of source code.

THE COURT: I understand all that. But assuming that this is an accurate summary of some of the data in the nine documents, are you saying that you really want every one of these topics?

MR. LYTTLE: No, your Honor. And the search terms don't touch on them.

THE COURT: What are your search terms? Do I have that in one of the innumerable letters in front of me?

MR. LYTTLE: No, your Honor. We provided it to them on Friday. We are happy to pass that up, if you would like.

THE COURT: My question, Mr. Liman, is, putting aside all the arguments on both sides, if the search terms work or if your counter to their search terms are workable, then that is an easy way to go about it. Have you looked at their search terms to see what they would hit?

MR. LIMAN: We have not run hit terms. Let me give you an example of their search terms. Search term number 1 is

port and, open parentheses, Simandou or Guinea or Liberia. We are talking about a port for iron ore coming out of Simandou, which is located in Guinea and where the nearest country is Liberia and where everybody who was talking about Simandou was talking about ports in Liberia. They list Liberia with an asterisk point. That is another one of their search terms.

THE COURT: Aside from saying that their search terms don't work, how about the two of you and your experts sit down and try to come up with search terms that work or other approaches that work.

MR. LIMAN: Your Honor, we would be happy to do that. I think the only way in which we are going to end up making progress is if they implicitly or explicitly tell us what it is that they think was misappropriated, because it can't be everything.

THE COURT: We are going in circles, and that really is the Groundhog Day. They are basically saying it's everything, and you are saying that can't be. There is merit to both of your positions. Whether it is predictive coding on this issue or search terms or limiting it to a much smaller list of custodians, whatever it is, you all are going to figure out a way to make this work. There is really no way for the Court to rule in the abstract.

I think the statute of limitations you say ran before the case was brought. In any event, to the extent that you

claim they are fishing, I am not likely to allow an amendment to the complaint based on information from broad discovery. Whatever is covered by the complaint is covered by it. If they discover you did some allegedly other horrible thing, they are out of luck.

Maybe I'm just doing what you all are doing, kicking this down the road until Judge Berman decides whether the case is here or not here, but I don't find that you all have given me enough to rule on this area. When you come back in January, it may be one of these where I look at one party's search terms plus custodian list and the other's and do what is a horrible way to resolve this, but if that is the only choice you give me, it's sort of going to be baseball arbitration. That is to say, whichever of those lists sounds more reasonable under the circumstances, you may get stuck with that. So go out and be reasonable.

MR. LYTTLE: Your Honor, my fear with that is now we are not going to agree on search terms. From past experience, we are not going to agree on search terms until we come back to see you. Rio will have made another production, yet Vale, who have had discovery requests pending for five months, two months later than Rio, will not have made production.

THE COURT: Don't worry about it. We are not closing discovery until you have all had a fair shake at discovery. In addition, you are the plaintiff. You should know your

documents and what has to be produced much better at the time you start a lawsuit. If that means you had to go faster, so be it.

Having said that, I'm here all of January. If you want to come back on January 4 or whatever is the first day after the holiday, I'll give you an early January date or a later date. I expect you all to work appropriately. If you don't want to kill as much of your Christmas, aim for a slightly later January date. But I do expect you to come back having made progress.

What date would you all like?

MR. LYTTLE: Your Honor, how does the week of the 12th look for you?

THE COURT: Fine. Anything other than Monday. What is your pleasure?

MR. LYTTLE: The 13th in the afternoon, your Honor, so we can travel up in the morning.

THE COURT: The 13th at 2 o'clock.

MR. LYTTLE: Thank you, your Honor.

THE COURT: Usual drill. The transcript is the Court's rulings. You are all ordered to buy the transcript.

MR. LYTTLE: Your Honor, I do have one additional point, if I may. You have suggested now a couple of times a special master. We do believe that would be productive for the parties. We certainly have not had a chance to discuss it with

defendants. We will. I did want to raise with the Court that we intend to raise that with defendants.

THE COURT: Let me note that you get the Court's services for free. The special master is, I don't know, 500 an hour or whatever is the current billing rate. There are some excellent former judges out there who do special master work. If you go that route, I would assume you will be splitting the cost either 50-50 or whatever else you come up with, possibly on a loser pay basis. But it is going to have costs.

I think you need to decide is it a judge making rulings. In the grand scheme of things, if not you are going to listen to the special master, you are just going to wind up paying for the special master to rule and write a letter, which you will file objections to me and then I'll rule and you will file objections to Judge Berman, and all that fun stuff, that really makes no sense.

Then the question is, do you need an e-discovery special master type who can help you with predictive coding or refining search terms and all of that, or do you need somebody to slog through privileged documents and decide if they are privileged or not, etc.? I'm not trying to shirk work, but your conferences always seem to go an hour and a quarter to an hour and a half, when my usual discovery conference in cases is half an hour.

I am in favor of special masters, other than the cost

issue. There are only about four cards on the sign-in sheet here. I don't know how many of you have fully signed in so your name is on the transcript. We have 15 lawyers here between the two sides. Money, obviously, is not much of an issue for you. I am in favor with those caveats. Talk to each other.

The other thing I will tell you is because of the complexity of this, you are going to get a fair amount of discovery time and not a three-month discovery period, even though we have now been doing discovery for umpteen months. Once Judge Berman rules on the pending motion or I rule on the stay of discovery motion, and the two are probably going to come out pretty closely in time, it is going to be full speed ahead.

You are going to have to learn to trade off things. You feel strongly about issue one, they feel strongly about issue two, you disagree. You will compromise on your own. You will go to a special master or, instead of dealing with you once a month, it might become an every Friday morning we get together. I hope we don't have to do that. But we are going to have to move faster going forward.

Anything else from either side? Hearing nothing, happy holidays all but. Don't stop working, at least not before the 24th. I will see you in January.

(Adjourned)